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Constitutional Law -- Defamation under the First Amendment -- The Actual Malice Test and "Public Figures"

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(1) defendant must be brought to trial within the same term of court in which the indictment is filed, or within the next succeeding term of a court competent to try him, and (2) unless good cause is shown by the state for failure to bring defendant to trial within this period, this statute shall operate as a bar to future prosecution for offenses arising out of facts alleged in the indictment. This proposed statute would not operate as a "sword for the defendant,"[31] for the General Assembly is able to draft initially, and subsequently revise as necessary, the time limitations to reflect the current ability of the state's courts, acting with reasonable diligence, to bring persons to trial. That period at any given time might be longer than two terms of court. At any rate, *Klopfer* makes clear that an outer limit of some type, however determined, is necessary.

So much for the law. In reality, Klopfer has not yet had his trial. He attempted to have the case removed to federal court under procedures recently outlined by the United States Supreme Court for cases arising out of civil rights disputes.[32] But the federal district court declined to take jurisdiction on November 17, 1967, stating that the state court should be given another chance to dismiss the indictment.

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Constitutional Law—Defamation under the First Amendment—The Actual Malice Test and "Public Figures"

In *New York Times Co. v. Sullivan*[1] the United States Supreme Court held that "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[2] was such that in certain cases libelous misstatements of fact were qualifiedly protected by the first and fourteenth amendments. In granting this constitutional protection to misstatements of fact,[3] the Court held that the protection was for critics of the

[31] State v. Lowry, 263 N.C. 536, 542, 139 S.E.2d 870, 875 (1965).
[32] Georgia v. Rachel, 384 U.S. 780 (1966); Greenwood v. Peacock, 384 U.S. 808 (1966).

[1] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[2] *Id.* at 270.
[3] The Court expressly adopted the minority view. 376 U.S. at 280 & 281. *See, e.g.*, Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908); Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962); Annot., 150 A.L.R. 358 (1944).

official conduct of public officials[4] but that it did not extend to a libelous statement made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[5] Failure to show that plaintiff was a public official or proof of actual malice destroyed the protection.

Much discussion and debate followed the *New York Times* decision concerning how far the constitutional protection was to be extended.[6] In response to this uncertainty, the Court granted certiorari in two cases to decide whether the first amendment protects "public figures" as well as public officials and if so, when the protection was to be lost.[7] Case No. 150, *Associated Press v. Walker* was a libel action arising out of newspaper accounts concerning the integration riots of September 30, 1962, at the University of Mississippi.[8] Case No. 37, *Curtis Publishing Co. v. Butts* arose out of an article published in the *Saturday Evening Post*[9] which falsely accused the athletic director of the University of Georgia of having conspired to "fix" a college football game.[10]

In deciding these two cases all members of the Court agreed that the first amendment qualifiedly protects libelous misstatements of fact made about "public figures" as well as those concerning public officials.[11] There was disagreement, however, over the test to be employed in determining the proof necessary to destroy the constitutional protection.[12] Five members of the Court applied the "actual malice" test of *New York Times* and reversed *Walker* because there

[4] 376 U.S. at 283.

[5] 376 U.S. at 279.

[6] Hanson, *Developments in the Law of Libel: Impact of the New York Times Rule*, 7 WM. & MARY L. REV. 215 (1966); Comment, *New York Times v. Sullivan: The Public Official and The Public Figure*, 30 ALBANY L. REV. 316 (1966); Note, 42 U. WASH. L. REV. 654 (1967).

[7] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[8] *Id.* at 140.

[9] SATURDAY EVENING POST, March 23, 1963, at 80.

[10] 388 U.S. at 135.

[11] 388 U.S. at 131-33 (syllabus). In thus extending the constitutional protection to "public figures," however, the Court failed to give a concrete standard for determining when a person was a "public figure." This interesting point is beyond the scope and purpose of this note. For discussion of who constitutes a public official *see, e.g.*, Rosenblatt v. Baer, 383 U.S. 75 (1966); Note, 46 BOSTON U. L. REV. 568 (1966); Note, 52 CORNELL L.Q. 419 (1967); Note, 39 TEMP. L.Q. 510 (1966).

[12] The first two parts of the opinion of Chief Justice Warren constituted the only majority opinion by the Court. 388 U.S. at 164. The four justices who concurred in this part of his opinion disagreed with the last half of the opinion, two of them dissenting on grounds other than the question of reckless disregard. 388 U.S. at 172.

was no proof of actual malice.[13] In *Butts*, however, two of these concluded that the evidence was insufficient to show the degree of reckless disregard necessary to defeat the constitutional protection while the remaining three thought it was sufficient.[14] The remaining four members of the Court voted to reverse *Walker* and to affirm *Butts*[15] arguing, however, that "the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake."[16] Instead they felt that the public figure should be able to recover on "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[17] The conflict in these opinions raises the question of whether the proof required to defeat the constitutional protection is to be less rigorous where public figures rather than public officials are involved.

The actual malice test as promulgated in *New York Times* is a two part test. The first half of the test, actual knowledge of the falsity of a statement, is easily applied.[18] It is in determining reckless disregard of the truth or falsity of the statement that problems arise. From the very nature of the test it can be seen that a determination of reckless disregard will involve many factors.[19] Cases which present the question, however, frequently involve wide publication of a statement, the falsity of which could have been discovered prior to publication by a more thorough investigation.[20] Thus the effect of the degree of investigation upon the determination of reckless disregard may often be important. To analyze this test under *New York Times* and *Butts* it is necessary to look at the specific factors the courts have found relevant.

In *New York Times*, the defendant newspaper published a paid advertisement which supported the civil rights movement in

[13] 388 U.S. at 164.
[14] 388 U.S. at 170-71.
[15] 388 U.S. at 133.
[16] 388 U.S. at 155.
[17] 388 U.S. at 155.
[18] Fox v. Kahn, 421 Pa. 563, 221 A.2d 181 (1966), *cert. denied*, 385 U.S. 935 (1966).
[19] It is clear that many factors have an effect upon the amount of investigation required. Some of these factors are: (1) The time lag between the occurrence of an alleged fact and its publication (is it "hot" news?); (2) The degree to which the publication is clearly defamatory; (3) Notice of probable falsity of the statement.
[20] *E.g.*, Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966).

Alabama. Several false statements were made about the activities of the Montgomery, Alabama, police department which plaintiff, the head of the department, claimed defamed him by innuendo. The Court held that the failure of defendant to investigate the validity of the statements before publication was "constitutionally insufficient" to show reckless disregard.[21] A clearer example of what the Court required for proof of reckless disregard in the case of public officials is found in *Garrison v. Louisiana*.[22] There the District Attorney of Orleans Parrish, Louisiana, was convicted under a Louisiana criminal libel statute for falsely accusing eight local judges of misconduct in office and dereliction of duty. The Supreme Court held, in striking down the statute as unconstitutional, that the trial court's finding that the statements were made with personal malice and without reasonable grounds to believe them true[23] was not sufficient to show reckless disregard because even where personal malice is present, defeasance of the protection can not be based on unreasonableness or mere negligence.[24] Thus, it seems that the reckless disregard test, as applied to public officials in these two cases, is a stringent test, almost the equivalent of requiring culpable knowledge.[25]

Although *Garrison* is the only post-*New York Times* decision by the Supreme Court that gives a further definitive showing of what would constitute reckless disregard in libel actions, several other courts have interpreted the standard, often in terms of investigation. The Court of Appeals for the Fifth Circuit in applying the test stated: "While verification of the facts remains an important reporting standard, a reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by public official."[26] Where a reporter for defendant newspaper wrote a story falsely accusing plaintiff, a justice of the peace, and his daughter of trying cases without jurisdiction, the fact that the reporter failed to make a

[21] 376 U.S. at 265.
[22] 379 U.S. 64 (1964).
[23] State v. Garrison, 244 La. 787, 154 So. 2d 400 (1963).
[24] 379 U.S. at 79.
[25] At least one state court has interpreted it this way, stating that "[R]eckless disregard must be the equivalent of the 'calculated falsehood' . . . ." Pauling v. National Review, 49 Misc. 2d 975, 981, 269 N.Y.S.2d 11, 19 (Sup. Ct. 1966).
[26] New York Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir. 1966).

single check of the court records for verification was held insufficient to show reckless disregard of the truth.[27] By contrast, where defendant magazine published an article which was based on the Civil Rights Commission Report and which stated that plaintiff was brutal towards Negroes when in fact the report only alleged this, the court held there was sufficient evidence to go to the jury on the question of reckless disregard.[28] The fact that the story was based on a written report from which information was inaccurately reported strongly suggests the existence of actual knowledge. A much clearer case of reckless disregard is found in *Thompson v. St. Amant*.[29] There the defendant, a candidate for public office, made a speech in which he accused a deputy sheriff, along with others, of taking bribes. Recovery was allowed on proof that defendant did not know plaintiff personally but based his clearly defamatory statement on the sole affidavit of a man of questionable reliability.

The defamatory article in *Butts* was based upon the affidavit of an insurance salesman who testified that an electrical error allowed him to overhear a telephone conversation in which Butts revealed the plays and plans of the Georgia team to an opposing coach. In determining that the evidence in *Butts* was constitutionally sufficient to show reckless disregard of the truth under *New York Times*, the Chief Justice alluded to the fact that "little investigative effort was expended initially, and no additional inquiries were made even after the editors were notified by respondent and his daughter that the account to be published was absolutely untrue."[30] But is it reasonable to require a publisher to investigate every time he is notified that a story to be printed is untrue? In the *New York Times* case, the plaintiff notified the Times that the statements in the advertisement were false and demanded a retraction. The Court held that "The Times' failure to retract . . . is . . . not adequate evidence of malice for constitutional purposes."[31] In addition, the Fifth Circuit Court of Appeals has interpreted *New York Times* to allow reporters to rely on a single source, exactly what the *Saturday Evening Post* did.[32] In his opinion the Chief

[27] Ross v. News-Journal Co., —Del.—, 228 A.2d 531 (1967).
[28] Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966).
[29] 250 La. 405, 196 So. 2d 255 (1967).
[30] 388 U.S. at 169-70.
[31] 376 U.S. at 286.
[32] New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966).

Justice alluded to the fact that the *Saturday Evening Post* had decided to embark on "a program of 'sophisticated muckraking' . . . "[33] and that it had published the article "with full knowledge of the harm that [was] . . . likely . . . [to] result . . ."[34] It should be remembered that in *Garrison* the defendant made his defamatory accusations in anger with the purpose of revenge, and even though they were made without reasonable grounds to believe them true, these facts were held not to constitute reckless disregard.[35] By comparing the amount of investigation held to be adequate in *New York Times* and *Garrison* with the amount held to be insufficient to avoid a finding of reckless disregard in *Butts*, it is reasonable to conclude that the test of reckless disregard applied to public figures in *Butts* is less rigorous than the one applied to public officials. This conclusion is buttressed by the fact that two members of the majority that extended the *New York Times* standard were of the opinion that the evidence in *Butts* was not constitutionally sufficient to show actual malice.[36] In addition, four members of the Court felt that a different and less rigorous test should be applied to public figures.[37]

It is submitted that the Supreme Court applied a less rigorous standard of actual malice in *Butts* than that applied to public officials. By applying a different standard the Court may be doing what Mr. Justice Black describes as "getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity."[38] It would not be unreasonably burdensome to have different standards of proof for public figures and public officials if these standards were clearly set forth by the Court. The first amendment does not necessarily require that a man who is well known because of his personal qualities be exposed to the same amount of uncompensated libel as the man who holds a public office, simply for the sake of having one legal standard. Whether the first amendment requires this equal exposure at all must be clarified by the Court in a future decision.

By failing to hold the public figure in *Butts* to the same standards of proof required from public officials, the Court left many

[33] 388 U.S. at 169.
[34] 388 U.S. at 170.
[35] 379 U.S. at 79.
[36] 388 U.S. at 170-71.
[37] 388 U.S. at 155.
[38] 388 U.S. at 171.

questions unanswered, not the least of which is whether this standard will apply uniformly to all public figures. It should be noted that Butts, while a public figure in one sense, had not "thrust himself into the vortex" of public controversy. Contrasted to this, General Walker had voluntarily involved himself in a public controversy by going to the University of Mississippi and speaking to the rioters. In a great majority of the cases decided prior to *Butts* in which the courts were willing to extend the *New York Times* rule to public figures, these public figures had voluntarily involved themselves in major public issues. Thus where a Nobel prize winning professor had publicly advocated the cessation of nuclear testing, the Eighth Circuit Court of Appeals by dictum held him subject to the actual malice rule.[39] On the other hand courts have been unwilling to extend the constitutional protection where the plaintiff was not involved in important public issues.[40]

It is purely subjective speculation to state that the Court intends the reckless disregard test to be different for different types of public figures. Yet the fact that such speculation can be rationally made is strong evidence of the confusing nature of this decision. In any event it is reasonable to conclude that the Court failed to adhere to the reasoning of the Chief Justice that "differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy,"[41] because the Court in *Butts* ostensibly did apply a different standard of proof than that applied to public officials.

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Constitutional Law—Procedural Due Process—Extension to the High School Disciplinary Proceeding

In *Madera v. Board of Education*,[1] the Federal District Court for the Southern District of New York held the due process clause

[39] Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966) (dictum); *accord*, Walker v. Courier-Journal & Louisville Times Co., 246 F. Supp. 231 (W.D. Ky. 1965), *rev'd on other grounds*, 368 F.2d 189 (6th Cir. 1966).

[40] Dempsey v. Time, Inc., 43 Misc. 2d 754, 252 N.Y.S.2d 186 (Sup. Ct. 1964); *accord*, Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966).

[41] 388 U.S. at 163.

[1] 267 F. Supp. 356 (S.D.N.Y. 1967).